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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1942

No. 527

MARCEL BANKE and GEORGE A. GLOOR,
Petitioners,
vs.
NOVADEL - AGENE CORPORATION,
Respondent

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

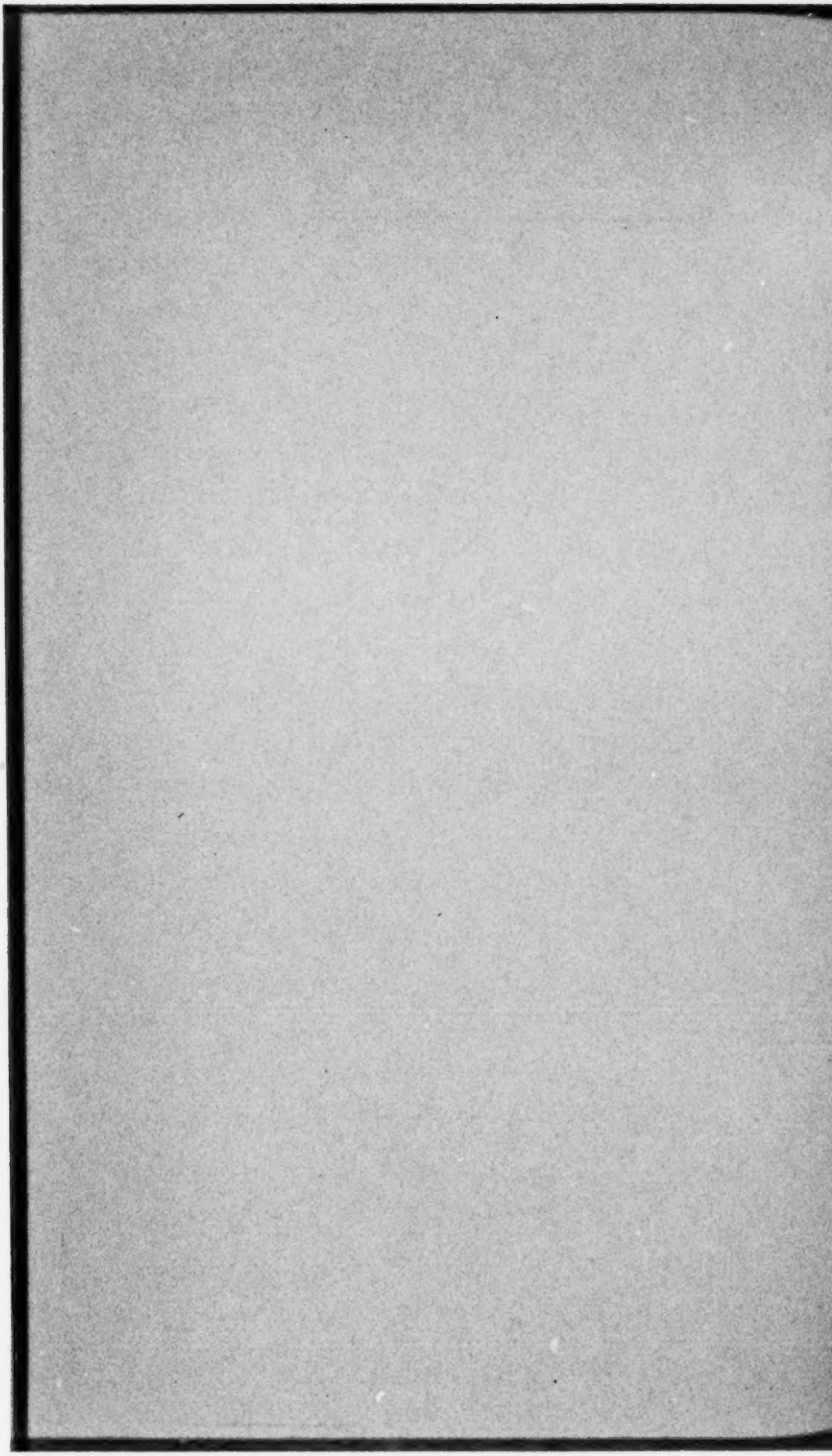
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## BRIEF IN SUPPORT

RALPH B. LACEY,
Attorney for Petitioners,
1204 Dime Building,
Detroit, Michigan.

J. SHURLY KENNARY,
Of Counsel,
1233 Dime Building,
Detroit, Michigan.

Interstate Brief & Record Co., Case Bldg., 607 Fort St. W., Detroit, Mich.



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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes the petitioners, Marcel Banke and George A. Gloor, and respectfully pray that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court, on a day certain to be

therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, entitled Marcel Banke and George A. Gloor, Defendants and Appellants v. Novadel-Agene Corporation, Plaintiff and Appellee, No. 9003, to the end that the said case may be reviewed and determined by this Court and that the said judgment of the said Circuit Court of Appeals in said case and every part thereof may be reversed by this Honorable Court and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem meet and just.

## JURISDICTIONAL STATEMENT

Section 240 (a) Judicial Code, as amended, confers jurisdiction upon the Supreme Court, to review by writ of certiorari, upon petition of any party thereto, the judgment herein of the Circuit Court of Appeals Sixth Circuit, entered on August 28, 1942, affirming a final decree of a District Court. The petitioners, parties to said case, present their petition for writ of certiorari within three months after the entry of said judgment in compliance with Section 350, Judicial Code.

## QUESTIONS PRESENTED

1. Does the entry of an *ex parte* final decree authorizing a permanent injunction, prior to trial of issues and without findings of fact, deprive the enjoined litigant of his constitutional right to due process of law?

2. Does a motion to set aside a void decree entered without jurisdiction, thereby confer jurisdiction *ex post facto* upon the court to sustain the decree?

3. May the Circuit Court of Appeals, in any case where original jurisdiction arises through diversity of citizenship, deny the application of Section 725 U.S.C.A.?

## REASONS FOR ALLOWANCE OF WRIT

The said Circuit Court of Appeals has:

1. Sanctioned such a departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Honorable Court's power of supervision, in that it affirmed a final decree entered *ex parte* without jurisdiction and without compliance with the rules of Civil Procedure.

2. Decided a federal statutory question in conflict with applicable decisions of this Honorable Court in that it refused to apply the Michigan decisions in accordance with Section 725 U. S. C. A.

## SUMMARY STATEMENT OF MATTER INVOLVED

Prior to December 9, 1940 the petitioners and the respondent each received a notice of hearing (R. 57) from the clerk of the District Court that the above entitled cause had been placed on the pre-trial calendar and would be called before the Honorable Ernest A. O'Brien, District Judge, in his Court Room on Monday, December 16, 1940 at 2 P. M.

Without regard to the pre-trial assignment, upon an oral request and without notice to the opposite party another District Judge, Honorable Arthur J Tuttle, on December 9, 1940, signed and filed a final decree authorizing a permanent injunction in the case (R. 50). None of the rules of civil procedure were complied with in this proceeding.

When the petitioners learned of the permanent injunction they filed a motion to vacate (R. 52). A hearing was had, the petitioner Banke appearing without benefit of counsel, and the motion was denied (R. 57). The Circuit Court of Appeals held that the irregularities in the entry of the permanent injunction was cured by the hearing on the motion to vacate (R. 71). The Court gave no consideration to the major objection, viz: that Judge Tuttle had no jurisdiction to take any proceedings in a case then regularly assigned by the clerk of the court to another judge.

These proceedings occurred in a case wherein the respondent had filed a bill of complaint seeking an injunction against the petitioners, based upon a summary judgment in a previous case of dismissal of a bill, filed by petitioners against respondent, for infringement by manufacturing, selling and using devices for cooling beverages.

Petitioners are the inventors of a new and useful article called a converter, used for pumping liquids. The United States and other governments extensively use the converter for pumping water in equipment for fighting forest fires. The converter is a mechanism for housing carbon dioxide gas vaporized within the mechanism from solid carbon dioxide (dry ice) and utilizing the same for useful purposes.

Possessed of the converter, the petitioners combined therewith a closed refrigerant chamber, including chambered walls of heat conducting material, whereby the liquid in the container would be cooled, together with necessary conduits between the container and the converter to accomplish the desired purpose and applied for and received a patent upon a combination for cooling, aerating and dispensing beverages.

The respondent has a patent on coils in the keg on account of the location of the cooling coil in the bottom part of the keg and the permanent fixture thereof therein; it combines therewith a refrigerant unit for the circulation of ice water through the coils to cool the beer in the keg. Exhibit A (R. 4) pictures same. The said Circuit Court of Appeals found that "Exhibit A disclosed the method or system by which the beer is cooled" (R. 71). In the original case, District Judge Lederle found that "the device shown in Exhibit A" does not infringe any of the claims of petitioners' combination patent. No appeal was taken from the summary judgment of dismissal of suit on this finding.

In petitioners' answer (R. 27) to respondent's bill of complaint herein, that petitioners be restrained from instituting any action against respondent, petitioners admit that the mechanism for cooling beer shown in Exhibit A does not in and of itself infringe petitioners' patent, but that when that mechanism is combined with an aerating and dispensing element, an equivalent of petitioners' converter, furnished by others than respondent, the so completed apparatus, is then a combination for cooling, aerating and dispensing beverages; that the device so constructed of combined mechanism is an infringement of petitioners' patent; that the defendants are legally entitled to institute action against the respondent and those confederating with respondent, who furnish the additional mechanism to respondent's apparatus, required to complete a cooling, aerating and dispensing unit.

The bill herein claims a wide construction of the summary judgment in the original case. It avers that that judgment covers not only the "device shown in Exhibit A" (the words used by the Court in the findings of fact therein) but also the use of that device when combined

with aerating and dispensing equipment. The petitioners, in addition to denial of this contention, claim, that the instant action, being an original bill to enforce a decree, apart from their fundamental right to a hearing on the new issues in the instant case, not involved in or concluded by the previous decree, that, under the Michigan rule, applicable herein under the Federal statute, they are entitled to controvert the issues in the original decree.

The decision of the said Circuit Court of Appeals, overrides the Michigan rule, notwithstanding the Federal statute and the decisions of this Honorable Court.

The petitioners possess valuable property rights of which they have been deprived without their day in court.

MARCEL BANKE,
GEORGE A. GLOOR,
Petitioners.

RALPH B. LACEY,
*Attorney for Petitioners,*
J. SHURLY KENNARY,
*Of Counsel.*

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